

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-183293

DATE: June 3, 1976

MATTER OF: Consolidated Airborne Systems, Inc. --Reconsideration

DIGEST:

GAO will not disturb contracting officer's determination that prospective contractor was nonresponsible due to lack of tenacity and perseverance based on poor performance on recent contracts since finding was not unreasonable. Accordingly, 55 Comp. Gen. 571 (1975) is affirmed.

Counsel for Consolidated Airborne Systems, Inc. (CAS) has requested reconsideration of our decision Consolidated Airborne Systems, Inc., 55 Comp. Gen. 571 (1975), 75-2 CPD 395. There we held that the evidence of record supported the contracting officer's determination that CAS was nonresponsible because of lack of tenacity and perseverance.

Our above-referenced decision dealt with an invitation for bids issued by the Army Aviation Systems Command (AVSCOM) for furnishing of 47 test set indicators and related equipment. CAS was declared nonresponsible by the contracting officer pursuant to Armed Services Procurement Regulation (ASPR) §§ 1-903 (1975 ed.) on the basis of a record of past unsatisfactory performance due to a failure to apply the necessary tenacity and perseverance to overcome deficiencies in performance and meet delivery schedules on prior contracts.

Specifically, the contracting officer's determination of nonresponsibility was based on information about CAS obtained by the Defense Contract Administration Services District (DCASD), Garden City, New York. In all, four surveys, consisting of two complete surveys and two partial re-surveys, were conducted of CAS by DCASD. The report to the contracting officer following each survey recommended that the contract not be awarded to CAS because of unsatisfactory ratings with respect to CAS's past performance record and ability to meet delivery schedules. Subsequent thereto, the contracting officer, pursuant to ASPR §§ 1-705.4(c)(vi) (1975 ed.) forwarded a written statement of his determination of nonresponsibility to the Commander, AVSCOM (the head of his procuring activity) and to the Small Business Administration (SBA). The contracting officer's findings were affirmed by the Commander, AVSCOM, notwithstanding SBA's appeal in which it maintained that CAS did apply sufficient tenacity and perseverance to insure satisfactory completion of its contracts.

CAS renews its assertion that the contracting officer's determination was incorrect. Moreover, CAS contends, in essence, that this incorrect result was due to the absence of a clear definition of just what is needed to support a contracting officer's determination that a contractor lacks tenacity and perseverance. In this regard CAS asserts that the failure to provide guidelines with respect to these types of determinations permits a variety of conclusions on the same set of facts. In support of its contention CAS points out that our prior decision in this case, 55 Comp. Gen. 571, supra, contains language clearly indicating that another contracting officer facing the same set of facts would not have questioned CAS's responsibility for lack of tenacity and perseverance. To further substantiate this point, CAS asserts that had the question of its responsibility fallen within the scope of capacity and credit rather than tenacity and perseverance, ASPR would require the determination of responsibility to be made by SBA, the same agency that appealed the finding that CAS lacked tenacity and perseverance.

Our decision of 55 Comp. Gen. 571, supra, citing 43 Comp. Gen. 228, 230 (1963), noted that this Office has held that contracting officers reasonably may reach different conclusions as to a bidder's responsibility. This is so because responsibility is a matter of judgment to be decided by the contracting officer and as to which contracting officers are given broad discretion. See ASPR §§ 1-900 et seq. (1975 ed.). In these circumstances opposite determinations by different contracting officers with respect to the responsibility of the same bidder for the same kind of procurement and with reference to the same set of facts have been made. See 39 Comp. Gen. 468, 472 (1959).

This Office recognizes that of necessity broad discretion should be vested in the contracting officer with respect to making determinations of a bidder's ability to perform a contract. As we pointed out in our decision of 43 Comp. Gen. 228, 230 (1963):

"Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the contracting officers involved who should be in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the Government's behalf. 39 Comp. Gen. 705, 711. * * * "

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We have consistently held that the question of a prospective contractor's responsibility is a matter for determination by the contracting officer involved. 45 Comp. Gen. 4 (1965), 51 Comp. Gen. 439, 443 (1972). Our Office does not make independent determinations as to a bidder's responsibility to perform a Government contract. Because reasonable men may well disagree as to a company's capability to perform a particular contract, our Office has adopted the rule that we will not substitute our judgment for that of the contracting officer unless it is shown that the determination of nonresponsibility was made in bad faith or lacked any reasonable basis. 37 Comp. Gen. 430 (1957); 49 Comp. Gen. 553 (1970); RIOCAR, B-180361, May 23, 1974, 74-1 CPD 282; see also, Plant Security, Incorporated, B-181684, March 17, 1975, 75-1 CPD 157.

Under 15 U.S.C. § 637(b)(7) (1970 ed.), SBA is empowered to certify to Government procurement officers the competency as to capacity and credit of any small business concern to perform a specific Government contract, and such certification is required to be accepted by procurement agencies as conclusive of a prospective contractor's responsibility as to capacity and credit. See 51 Comp. Gen. 288, 291 (1971). However, factors relating to nonresponsibility which do not relate to capacity and credit, i.e., not whether the bidder can perform but whether he will perform, see e.g., 43 Comp. Gen. 298 (1963), are not covered by the above-referenced procedures. See e.g., District 2, Marine Engineers Beneficial Association--Associated Maintenance Offices, AFL-CIO, B-181265, November 27, 1974, 74-2 CPD 298.

In the instant case the contracting officer's determination of nonresponsibility concerned lack of tenacity and perseverance. See ASPR §§ 1-903.1(iii) (1975 ed.). The contracting officer's determination where lack of tenacity and perseverance is involved must be supported by substantial evidence documented in the contract file and is subject to approval by the head of the procuring activity. ASPR §§ 1-705.4(c)(vi) (1975 ed.). In addition this same Regulation provides that SBA be notified of the adverse determination and that SBA may submit contrary views to the procurement agency. However, ASPR §§ 1-705.4(c)(vi) (1975 ed.) states that " * * * After, consideration of the appeal, the decision by the head of the procuring activity * * * shall be final." See M.C. & E. Service & Support Co., Inc., B-184856, February 10, 1976, 76-1 CPD 84.

Based on an examination of the record we cannot say that the determination made by the contracting officer and affirmed by the head of the procuring activity was made in bad faith or lacked any reasonable basis. See Contract Maintenance, Inc.; Merchant Building Maintenance Company, B-181581, October 8, 1974, 74-2 CPD 193.

CAS next contends, in essence, that because the instant case concerned a determination of a lack of tenacity and perseverance, our Office should not have relied on its rule that it would not substitute its judgment for that of contracting officials absent a flagrant or unreasonable abuse of discretion. In this regard CAS asserts that the reasoning for this rule is sound but that "the very nature of a conclusion that a contractor lacks tenacity and perseverance requires a conclusive determination by all unbiased viewers that a contractor should be so declared."

ASPR §§ 1-904.1 (1975 ed.) requires that no contract is to be awarded unless the contracting officer first makes an affirmative determination that a prospective contractor is responsible. In this regard ASPR § 1-902 (1975 ed.) states in part that "The contracting officer shall make a determination of nonresponsibility if, after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly that the prospective contractor is responsible."

In the instant case the contracting officer, pursuant to ASPR 1-905.4 (1975 ed.) requested four pre-award surveys, consisting of two complete surveys and two partial re-surveys, with respect to making a determination as to CAS' responsibility. On the basis of this information the contracting officer concluded that CAS' unsatisfactory record of past performances resulted from a failure to apply the necessary tenacity and perseverance to do an acceptable job. What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was reasonably necessary to resolve its problem. B-170224(2), October 8, 1970. This determination, as has already been noted, was required to be supported by substantial evidence documented in the contract files. In addition, the determination of the contracting officer was affirmed by the Commander, AVSCOM, pursuant to ASPR § 1-705.4(c)(iv) (1975 ed.). In the circumstances we cannot conclude that the determination was unreasonable or that the well-established rule with respect to our review of such determinations should now be altered. See Building Maintenance Specialists, Inc., B-181252, September 13, 1974, 74-2 CPD 166.

CAS next asserts that our decision denying its protest did not recognize that CAS had been awarded new contracts from AVSCOM. In this regard CAS points out that on September 23, 1974, three days after opening of the subject bid AVSCOM opened bids on IFB No. DAAJ01-75-C-0258, following which AVSCOM's own survey personnel recommended that a contract be placed with CAS. CAS notes that it was awarded this contract despite receiving a negative preaward

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survey from DCASD and, moreover, that delivery was made in a timely fashion under this contract. Accordingly, CAS states that this information, along with other evidence, supports SBA's reasoned conclusion that CAS was constantly improving its performance.

The above-mentioned information does not affect our decision denying CAS' protest. Since we have already noted that the issue of whether a potential contractor is responsible concerns a matter of judgment and that reasonable men may differ as to the determination, a further response to this issue would be unnecessary.

In addition, CAS contends that the contracting officer's determination was not based on an independent analysis but rather on a determination made by DCASD. In this regard we note that ASPR §§ 1-905.4(a) and (b) (1975 ed.) provides, in part, as follows:

"(a) General. A pre-award survey is an evaluation by a contract administration office of a prospective contractor's capability to perform under the terms of a proposed contract. Such evaluation shall be used by the contracting officer in determining the prospective contractor's responsibility. The evaluation may be accomplished by use of (i) data on hand, (ii) data from another Government agency or commercial source, (iii) an on-site inspection of plant and facilities to be used for performance on the proposed contract or (iv) any combination of the above. * * *"

* * * * *

"(b) Circumstances Under Which Performed. A pre-award survey shall be required when the information available to the purchasing office is not sufficient to enable the contracting officer to make a determination regarding the responsibility of a prospective contractor. * * *"

Since the information obtained by DCASD was germane to the inquiry it was proper for the contracting officer to make use of such information. Gary Construction Company, Incorporated, B-181751, December 17, 1974, 74-2 CPD 357; Cal-Chem Cleaning Company, B-179723, March 12, 1974, 74-1 CPD 127.

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In view of the foregoing our decision of December 16, 1975
is affirmed.


Deputy Comptroller General
of the United States